Supreme Court of the United States

OCTOBER TERM, 1920.

No. 555.

THE TEXAS COMPANY,
Libelant-Petitioner,

against

HOGARTH SHIPPING CORPORATION, LTD., owner of the steamship *Baron Ogilvy*, and HUGH HOGARTH & SONS,
Respondents.

BRIEF FOR PETITIONER.

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Supreme Court of the United States

THE TEXAS COMPANY, Libelant-Petitioner, against HOGARTH SHIPPING COMPANY, LTD., Owner of the Steamship *Baron Ogilvy*, and HUGH HOGARTH & SONS, Respondents.	October Term, 1920—No. 555.

This case comes up on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a decision of that Court affirming the dismissal of the libel herein.

The suit was brought in admiralty, in the District Court for the Southern District of New York, by The Texas Company, charterer of the British steamship *Baron Ogilvy*, against the respondents, owners of the steamship, to recover damages for breach of a charter-party. The parties are referred to in this brief as "charterers" and "owners," respectively. The breach complained of was the owners' absolute refusal to perform, and repudiation of, the charter-party. The principal defense was that the vessel had been prevented from performance by an alleged requisition of the British Government. The District Court upheld this defense and dismissed the libel (Opinion, Record, pp.

234-238; 265 Fed., 375). The Circuit Court of Appeals affirmed without opinion (Record, p. 253).

Statement of Facts.

1. *The Charter-party.*—The charter-party in suit is a rate charter, executed at the City of New York on February 6, 1915. It is printed in the record at pages 150-158. By it the owners chartered one of their vessels (to be named later) for a voyage from Port Arthur, Texas, "to a port between Cape Town and Delegoa Bay, both inclusive," with a full cargo of refined petroleum, at an agreed rate of freight. Subsequently the steamship *Baron Ogilvy* was named.

The charter is unusual in that it does not contain the clause, so common in shipping documents, excepting "restraints of princes, rulers and people." Since the contract was made at a time when the war had been in progress for six months, this omission is especially worthy of notice. Not only did the charter omit this all but universal clause, but it contained a special clause indicating that it was to be performed even though performance could not be rendered at the expected time. This clause reads as follows (pp. 152-153, fols. 456-457):

"The lay days for loading are not to commence before April 15th, 1915, except with the consent of the Charterers or their Agents, and if the vessel is not ready to load by two o'clock P. M. on May 15th, 1915, the Charterers shall have the option of cancelling or maintaining this charter, their decision to be given at once, if the vessel be then at the loading port; but if the vessel has not then arrived their decision need not be given until twenty-four hours after arrival."

It appears from the foregoing that the charter was not one for a voyage to be performed at any exactly specified time. The charterers had on May 15th an option of "cancelling or maintaining" the charter, but it was expressly provided that they need not exercise that option until the vessel reported for loading. The charterers were, of course, entitled to require her to report and, if they so desired, to perform the charter, at a period later than May 15th.

This was, therefore, an American contract for a voyage from an American port, made in New York, between an American citizen and British citizens, at a time when Great Britain was involved in the war and the United States was neutral; it contained the clause referred to above, indicating that the owners were to carry out their contract at any time, even later than the expected time, unless the charterers, upon tender of the vessel to load, should elect to cancel; and it constituted an absolute contract to carry the cargo, since it contained no restraints of princes clause, much less any clause making it void in case of requisition. The omission of these clauses is significant. At the time when the charter was executed, the war had been in progress for over six months; numerous vessels had already been requisitioned by the British Government, including apparently a number of vessels belonging to these same owners, though the precise dates of these requisitions do not appear in the record (see Hogarth, pp. 47, 54, fols. 139, 140, 160). At the outbreak of the war the British Government had, by proclamation, announced its intention of requisitioning British vessels as required (see Proclamation, p. 14 of Record). This proc-

lamation was notice to all the world. From that time forth requisitioning was constantly practised. One of the officials of the Admiralty testified (p. 82, fol. 244):

"Q. Since the outbreak of the war, I need scarcely ask, you have requisitioned a very large amount of British tonnage? A. A very large amount."

It is inconceivable that the possibility of requisition could have been absent from the minds of the parties. Moreover, it specifically appears that war conditions were in their minds from the insertion in the charter of certain special clauses having to do with war conditions (pp. 156-158, fols. 468-473). These provided in substance that the ship should have the right to obey any orders given by the British Government as to routes and other incidents of the voyage; should be employed only in trades lawful for a British ship; should not carry cargo which would expose her to seizure by the Allies; and should not violate any of the warranties in her war risk policies, which warranties provided in effect that the instructions of the British Government should be followed as to routes, ports of call, time of starting, etc., and that the ship should not enter a blockaded port (pp. 157-158, fols. 470-472).

2. *The Alleged Requisition.*—The answers alleged that, on April 10, 1915, while at London, the *Baron Ogilvy* "was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service, under and pursuant to the general prerogative of the British Crown and in pursuance of the Royal Proclamation, dated August 4, 1914" (p. 10, fol. 29; p. 21, fol. 63). The answers further set forth that this alleged requisition constituted "a restraint of princes" (p. 11,

fol. 31; p. 22, fol. 64), and that by reason thereof the "charter-party became impossible of performance" (p. 11, fol. 31; p. 22, fol. 65).

Certain other defenses were pleaded, which were not sustained by the Courts below. These are briefly discussed at pages 18-20, *infra*. The real question in the case is, however, the validity of the requisition defense, already referred to.

The facts with regard to the alleged requisition may be summarized briefly as follows:

The owners' proof showed that the Royal Proclamation referred to in the answers purported to authorize the Lords Commissioners of the Admiralty "by warrant under the hand of their Secretary or under the hand of any Flag officer of our Royal Navy holding any appointment under the Admiralty, to requisition and take up for Our Service any British ship, etc." (p. 205, fols. 613-614).

No such proceeding as this was ever had. The alleged requisition consisted solely of a telegram sent to the owners on April 10, 1915, by Mr. Ernest J. Foley, an Assistant Director of Transports in the service of the British Admiralty. This telegram read as follows:

"Hogarth Glasgow SS *Baron Ogilvy* is requisitioned under Royal proclamation for Government service.

TRANSPORTS."

This telegram was all that was ever done by way of requisition.

At this time a correspondence was in progress between the Admiralty and the owners, as a result of which a voluntary agreement was entered into whereby, in place of the alleged requisition, the owners chartered the vessel to the British Govern-

ment, at a freight higher than the requisition rate, *for a series of four trans-Atlantic voyages.* As soon as this was done, the owners wholly repudiated the charter and notified the charterers (on April 12, 1915) that they would not perform it *at all.*

The four trans-Atlantic voyages, for which the owners chartered the vessel to the British Government, were expected to take, and did take, more than six months; and, on their conclusion, the vessel was released from Government service. This was in October, 1915 (Foley, p. 85, fol. 253; Hogarth, p. 65, fol. 193). The vessel was never tendered to the charterers for service under the charter (Hogarth, p. 65, fol. 193; p. 7, fol. 19). It further appeared that one term of the agreement between the owners and the British Government was that the Government agreed to protect and indemnify the owners against such claims as the present (p. 60, fol. 179).

3. *The Owner's Voluntary Charter for Four Trans-Atlantic Voyages.*

In order fairly to present the questions involved, a fuller statement is necessary regarding the correspondence which resulted in the agreement between the owners and the British Government that the vessel should make the four trans-Atlantic voyages.

On March 31st, the owners received an intimation that the vessel might be requisitioned. This was in the form of a telegram sent by a firm of ship brokers "on behalf of the Admiralty" (Hogarth, p. 49, fol. 145). The telegram read:

"Admiralty Note *Baron Ogilvy* in London may require requisition her please post plan say when expect discharged" (p. 166, fol. 498).

On April 1st an inquiry was made on behalf of the Admiralty (p. 168, fol. 502) by Hogg & Robinson, the Admiralty's agents (Hogarth, p. 49, fol. 147), for vessels

"capable of carrying from about 4,000 to 6,000 tons, measurement, of hay."

The letter goes on to say:

"they will be required on this service *for some weeks* and as the next vessel is wanted to commence loading at Belfast on the 6th instant or as soon after as possible, we shall be obliged if you will kindly send us a wire, on receipt, for the information of the Admiralty authorities." (The italics in the above and in the following extracts from this correspondence are ours.)

Hogarth testified (pp. 49-50, fols. 147-148):

"Q. How did Messrs. Hogg & Robinson come into it? A. They were Admiralty agents. Their paper is headed 'Admiralty Shipping Agency.' They represent the Admiralty in the city for procuring tonnage and arranging shipments of stores for the government.

Q. And their purpose was to get the vessel for the government for the purpose of carrying hay, apparently? A. Yes."

On April 6th, the owners replied that their only vessel of the type in question in or shortly due in England was the *Baron Ogilvy* (p. 172, fol. 515).

On April 9th, Harley & Company, who were ship brokers, telegraphed to the owners as follows:

"*Baron Ogilvy.* Referring to Admiralty notice requisition we believe could induce them take her instead for 3 or 4 trips New Orleans Avonmouth or Liverpool £14 namely £13.10.0, 10 shillings gratuity. Shall we try to do so?"

On the same date, Harley & Company wrote the owners as follows (pp. 174-175, fols. 522-523):

"With reference to notice of requisition by the Admiralty of this steamer, *we believe it would suit their purpose just as well if they were to charter her* for voyages from New Orleans to Avonmouth or Liverpool for Mules, at £13.10.0 and 10/. gratuity *for three or four trips and we believe if you were to authorise us to approach them that we could arrange this matter.*

The conditions of course would be the same that are obtaining *in the case of your other steamers running under charter to the Admiralty* for this mule business.

We await your views on the matter."

Also on April 9th, Messrs. Harley & Company addressed a letter to the Director of Transports reading as follows (p. 178, fols. 532-534):

"*Baron Ogilvy.*
Now London expected discharged Monday.

With reference to your verbal notice of requisitioning this steamer, we beg to say that *if it would suit your purpose equally well to charter her for four trips* from New Orleans to Avonmouth or Liverpool for the conveyance of Mules, that *owners would be agreeable* (you nevertheless remaining responsible for any third party claims *as under requisition*) to undertake that employment on being paid freight at the rate of £13.10. per head of mule put on board, plus 10./ gratuity on the number landed alive.

Owners undertake all the fittings, foddering, electric light, wireless telegraphy, to supply attendants etc. in the usual manner as they are doing in the case of the other 'Baron' steamers at present under your employment, and they would do their best to carry out this work to your satisfaction.

In the event of your agreeing to this proposal the steamer would fit up at New Orleans to carry as much mules as possible under the supervision of your Officer there.

If this suggestion meets your approval we shall be glad of an early reply owing to the prompt position of the steamer in order that owners may make the necessary arrangements."

It will be noted that this is distinctly put forward as a proposition of *voluntary charter in lieu of requisition.*

On April 10th, the telegram constituting the alleged requisition, which is quoted above (p. 5), was sent to the owners. On the same day Harley & Company wrote to the Director of Transports a letter proposing a charter for four trips New Orleans to Avonmouth or Liverpool, which was practically a copy of their letter of April 9th quoted above. It contained, however, the following postscript (p. 184, fol. 551):

"We estimate this steamer's position would be as under

1st voyage	ready	New Orleans			about 16th May
2nd	"	"	"	"	about 30th June
3rd	"	"	"	"	about 15th August
4th	"	"	"	"	about 1st October."

It is therefore plain that this proposal was made with deliberate knowledge that it would be the end of October before the vessel could complete the four voyages.

This offer was accepted by the Director of Transports in a telegram dated April 10th and reading as follows:

"Your offer *Baron Ogilvy* four voyages conveyance of mules New Orleans to Avonmouth or Liv-

erpool freight thirteen pounds ten shillings per head gratuity ten shillings each animal landed alive is accepted stop please say when and where ship can be inspected."

On the same date the owners wrote Harley & Company ratifying and approving the terms of the offer made to the Director of Transports and stating (p. 186, fol. 557):

"We asked you in our wire to make arrangements to have her taken up on the 'per head mule' basis, for four trips, as we prefer it to the 11/. Time Charter, and no doubt we will have word from you shortly that this has been arranged."

On April 12th the owners wrote Harley & Company that they noted the acceptance of the proposed mule charter by the Admiralty and that they were accordingly proceeding to fit the vessel for the service. The formal letter of confirmation from the Director of Transports appears at folios 568 to 572. The material portion of it reads as follows:

"With reference to your letter of the 10th instant and in confirmation of my telegram of the same date, I beg to inform you that your tender of the S.S. *Baron Ogilvy* is accepted for the conveyance of 672 mules from New Orleans to Avonmouth or Liverpool for four voyages, the first homeward sailing to be about 16th May."

There followed certain conditions of acceptance in which the compensation is fixed at £13.10.0 for each animal shipped plus 10/. for each animal landed,

"conditions to be as at present operative in the case of other vessels belonging to Messrs. Hogarth & Sons engaged in this service."

Hogarth, the owners' manager, testified that the *Baron Ogilvy* was employed by the Government under "a special bargain" (p. 59, fol. 177). One provision of the bargain was that the Government undertook to indemnify the owners against claims on the vessel's commitments (p. 60, fol. 179).

On the same day (April 12th) the owners repudiated the charter in suit. This was done by a letter written to the charterer by the owners' agents in New York, giving notice, not that performance of the charter would be delayed, but that it would not be performed *at all*. The letter read as follows (pp. 34, 35, fols. 102-103):

"*Baron Ogilvy*. Referring to this steamer's charterparty, dated at New York February 6th, 1915, kindly be advised that we are this morning in receipt of the following cable from Glasgow:

'*Baron Ogilvy* requisitioned.'

This means that the steamer has been commandeered by the British Admiralty and will therefore not be able to carry out charterparty with you."

Hogarth testified (p. 65, fol. 193) that he considered that he had "no liability to the Texas Company."

The charter being thus repudiated, the charterers proceeded to secure other tonnage (Answer to Second Interrogatory, p. 35, fol. 104).

The terms thus secured for the mule trade were more favorable to the owners than the regular requisition rate. The latter was 11 shillings per deadweight ton per month on a time charter basis (p. 71, fol. 211). The owners clearly expressed their preference for the freight payable for carrying

mules (p. 40, fol. 119; p. 186, fol. 557). This netted, according to Hogarth (p. 71, fols. 211, 212), £100 to £200 a month more than the regular 11 shilling rate.

The carriage of the mules under the agreement thus reached with the Admiralty was evidently more profitable to the owners than the performance of the petitioner's charter would have been. Under that charter, the vessel would have carried 180,000 cases of oil (Hogarth, p 71, fol. 211) at the charter rate of 47 cents per case (p. 151, fol. 452), thus earning $80,600 in a period estimated by Hogarth (p. 55, fol. 164) at three and one-half months—say $23,000 gross per month. At the end of the voyage the vessel would have been in the remote ports of South Africa. Under the mule charter the vessel actually carried on her four voyages 804, 902, 903 and 904 mules respectively—a total of 3,513 (Thompson, p. 140, fol. 418). This made a total freight, at £14 a head, of £49,182, or $236,073.62, taking the exchange at $4.80. The voyages occupied about seven months. The monthly earnings were therefore $33,724.80; about $10,500 per month, or over $310 per day, in excess of the sums which would have been earned under the oil charter. Also war risk was carried by the Government (p. 72, fol. 214). While it is quite true that out of these earnings the owners paid for fittings, attendants and fodder, it seems perfectly clear that the net return far exceeded that under the oil charter—to say nothing of the advantage of having the vessel in North Atlantic waters at the expiration of the service. Certainly the above figures show that Hogarth's testimony that he would have made "infinitely more" (fol. 164) un-

der the petitioner's charter, and that he sustained "a very great loss" (fol. 212) in the Admiralty's service, is wholly incorrect.

It is also plain that the oil charter was below the market, since on April 14th it cost the charterer 66 cents per case to secure other tonnage (fol. 445), as against the rate of 47 cents in the *Baron Ogilvy's* charter. Altogether, it is clear that the oil charter could have had few attractions for the owners.

Six things appear from the foregoing testimony and correspondence: (1) The alleged requisition was made in a manner which did not even remotely approximate the method prescribed by the Royal Proclamation pleaded in the answers and quoted at page 5, *supra*. (2) The vessel was employed, not technically under any requisition at all, but under a voluntary charter. (3) Her freight rate with the Admiralty under this voluntary charter was in excess of the usual requisition rate and in excess of the petitioner's charter rate. (4) The only evidence as to the probable length of the service under the alleged requisition is that contained in the letter of April 1, 1915, quoted above, in which the Admiralty's representatives state that vessels were desired to carry hay *"for some weeks"* and to load at Belfast on April 6th or shortly after. (5) The vessel's cancelling date was still five weeks off. (6) The owners, at their own instance, made a charter which they *knew* was going to last at least until the end of October, thereby making it certain that the vessel, instead of being released at the end of "some weeks" (which might mean three or four weeks), was going to be retained for *at least six and one-half months*. Having thus deliberately entered into an engagement which was certain to occupy their vessel for six or seven

months (but which had the advantage of giving them better freights), they informed the charterers that they were not going to perform the charter sued on. This information was given by letter dated New York, April 12th, and was presumably based on a cable sent from London on the 11th, the very day after the charter to the Admiralty had been concluded.

4. *Intervention of British Ambassador.*

At the trial in the District Court, the British Ambassador appeared by counsel as *amicus curiae*. He (1) requested the Court to decline jurisdiction of the case, which the Court refused to do (Record, pp. 30, 31), and (2) offered a certificate and suggestion, which were received in evidence (p. 38, fol. 113). They are printed at pages 42-44 of the record, and they set forth, in substance, that the *Baron Ogilvy* was requisitioned by the British Government; "that from and after the date of requisition the steamship *Baron Ogilvy* was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915"; that the requisition was a governmental act; "and that neither the fact of said requisition, nor its effects, should be inquired into by this Court." Counsel for the charterers objected and excepted to the introduction in evidence of these documents (pp. 39, 40, fols. 117, 118). Counsel for the charterers also objected to any intervention in the case by the British Ambassador (p. 33), on the ground that communications from the diplomatic representative of a foreign power should come, if at all, through the Department of State. The District Court ruled to the contrary (pp. 32, 33, fols. 95-99).

It will be seen from the foregoing statement of facts that the chief questions presented are:

1. Where a charter-party in the present form is made in the United States and its enforcement is sought in a court of the United States, is it a defense to say that performance has been prevented by British law or by the British executive?

2. Does the mere fact of requisition, without evidence that the performance of the contract will be inordinately delayed, terminate the charter?

3. Can the owner of a requisitioned ship voluntarily substitute for the requisition, which might end at any time, a charter whose performance is *certain* to require six or seven months and then claim that he is thereby released from the vessel's previous commitments?

4. Was there a requisition at all in the present case?

A negative answer to any one of these questions will establish the charterers' right to recover.

The offer of the Ambassador's certificate and suggestion also raises questions in connection with the third and fourth of the above inquiries as follows:

1. Is such a communication, not under oath, not based on personal knowledge, and not subject to cross-examination, admissible at all?

2. Is such a communication properly made by a foreign diplomatic representative directly to the Court, or should it come through the Department of State?

3. If the communication is admissible at all, is it conclusive on an American litigant in an American court?

4. Do the certificate and suggestion in the present case, phrased as they are, constitute an assertion that the *Baron Ogilvy* was in fact under requisition during the period from April to October, 1915?

The following questions are also presented:

If a charter is made of a vessel to be named, and the vessel subsequently named becomes unavailable by reason of requisition, does any duty rest upon the shipowner to substitute another vessel?

If a vessel which is under charter is requisitioned, does not the owner owe the charterer a duty to make reasonable efforts to secure her release or, failing that, to substitute another vessel?

Specification of Errors.

The assignments of error are printed at pages 243 to 248 of the record. Without stating them at length, the petitioner alleges that the opinion and decree below are erroneous in the following principal particulars:

(1) In holding that it is immaterial whether or not there was a valid requisition, and in failing to hold that there was no valid requisition (Assignments 1 to 3, p. 243).

(2) In holding that the British Government took and used the *Baron Ogilvy* at the time when the charter should have been performed, and that such use was *in invitum* (Assignments 4, 10, pp. 243-244).

(3) In holding that the alleged requisition by the British Government and the alleged use of the

vessel thereunder extinguished the obligation of the contract (Assignments 17 to 23, 25, 26 and 27, pp. 246-247).

(4) In holding that the obligation of the charter, which was an American contract, was dissolved by the alleged act of the British Government (Assignments 17 to 23, 25, 26 and 27, pp. 246-247).

(5) In holding that, for the purposes of this suit, upon the alleged requisition the *Baron Ogilvy* became non-existent (Assignment 24, p. 247).

(6) In failing to hold that the service of the vessel with the British Government was under a voluntary agreement which prolonged the period of such service to between six or seven months and that the use of the vessel for such service did not excuse the respondents from their charter obligation (Assignments 4, 8, 10, pp. 243-244).

(7) In failing to hold that, even if there was a requisition, that fact did not constitute a defense, in view of the terms of the contract and the circumstances under which it was made (Assignments 16 to 27, pp. 246-247).

(8) In failing to hold that the respondents were under obligation to use proper efforts to prevent the alleged requisition and to obtain the release of the vessel and that they failed to do so (Assignments 6, 7, 9 and 15, pp. 244-245).

(9) In failing to hold that the respondents should have tendered another vessel to the petitioner if and when the *Baron Ogilvy* became unavailable (Assignments 11 to 14, p. 245).

(10) In receiving in evidence the certificate and suggestion of the British Embassy (Assignments 28 and 29, p. 247).

And generally in holding that, under the circumstances of this case, the action of the British Government, such as it was, relieved the respondents from all obligation to perform the charter.

POINTS.

FIRST.

In the absence of a restraints of princes clause, the shipowners' obligation under the charter-party was absolute, and prevention by foreign law was not a defense.

1. *Where a shipowner enters into an absolute covenant to carry a cargo, without protecting himself by exceptions, he is bound to perform it or to pay damages.*

The practice of embodying certain exceptions in contracts of carriage is so common that one almost unconsciously assumes that a carrier is not liable for non-performance due to causes commonly covered by exceptions. Nevertheless the law both in this country and in England is plain that the carrier is liable on his covenant unless he has protected himself by exceptions. Indeed, if this were not true, there would be no object in having exceptions.

An examination of the charter in suit (Record, pp. 150-158) shows that it contains no exception whatever applicable to the situation. The owners

in their answers (pp. 8, 9, fols. 23-28) undertake to set up certain clauses attached to the charter for insurance purposes, none of which, however, cover this case. It is, for example, provided (p. 156, fol. 468) that bills of lading issued for the cargo shipped under the charter shall contain a clause permitting the ship to comply with the orders of the British Government or of the War Risk Insurance with regard to routes, times of sailing, etc. These provisions do not purport to cover a refusal to sail at all, and obviously they have no application whatever to the present case, since no bills of lading were ever issued.

The other conditions referred to appear at pages 157, 158, folios 470-473, and are to the effect that the vessel's trades must be such as are lawful for British ships; that she shall not be used for such cargo as would expose her to seizure or condemnation by the Allies; and that there shall be no breach of the warranties contained in the vessel's war risk policies, namely, that she shall comply so far as possible with the orders of the British Government and of the War Risk Insurance Committee with regard to such details of the voyage as route, ports of call and stoppages; that she shall not sail if ordered not to; that she shall leave enemy ports within the days of grace allowed by the enemy; and that she shall not enter a blockaded port. Obviously these provisions have to do with the manner of performance of the charter and are wholly inapplicable to a situation where the charter has been repudiated and never performed at all. Clearly they do not apply to the present case, and the District Court properly so held, saying (fols. 702-703):

"The parties executed a charterparty containing no restraints of princes clause—and (as I construe the document) no other clause or rider thereof authorizing either party to invoke the line of decisions construing and enforcing that phrase."

The following cases show the extent of the carrier's liability under such a contract:

In *Spence* v. *Chodwick*, 10 Q. B., 517, certain goods were shipped by the plaintiff on the defendant's vessel from Gibraltar for London. There were certain exceptions not including restraints of princes. The declaration alleged shipment and non-delivery; the defendant pleaded that the goods had been seized and condemned by the Spanish authorities. This plea was held bad on demurrer. The Court said, per Patteson, J., at page 528:

"The defendant's contract is to carry the plaintiffs' goods to London and he is liable for non-performance of his contract unless its performance was prevented by some of the exceptions provided against or by the act of the plaintiffs themselves or by the law of this country."

Per Wightman, J., page 530:

"The defendant here was prevented by unavoidable necessity from performing his contract. But he might have provided in his contract against the consequences of such a contingency; he has not done so and is without excuse."

This decision was followed in *Jacobs* v. *Credit Lyonnais*, L. R. 12 Q. B. D., 589 (p. 34, *infra*), and was approved by this Court in *Howland* v. *Greenway*, 22 How., 491, where a shipment of cargo was made at New York for Rio de Janeiro and

was not delivered because it was seized by the Brazilian authorities in consequence of the master's failure to comply with the local customs regulations. This Court held that the shipowners' liability was absolute, saying (p. 502):

"Their contract is an absolute one to deliver the cargo safely, *the perils of the sea only excepted.* Under such a contract *nothing will excuse them for a non-performance except they have been prevented by some one of these perils, the act of the libelant or of the law of their country.* No exception of a private nature which is not contained in the contract itself can be engrafted upon it by implication as an excuse for non-performance."

The opinion refers to *Spence* v. *Chodwick, supra,* with approval for the proposition that:

"When a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may notwithstanding any accident by inevitable necessity because he might have provided against it by his contract."

In *The Harriman,* 9 Wall., 161, a vessel was chartered to carry a cargo of coal from San Francisco to certain South American ports to be named. Valparaiso was named. The coal was in fact destined for the Spanish navy. When the vessel reached South American waters, the Spanish navy had departed for an unknown destination, and the master returned to San Francisco. This Court held the shipowner liable, saying:

"The existence of the war was known to both parties when the contract was entered into. The owner made no provision against any contingency. His engagement was simple, direct and unconditional that the vessel should proceed to Valparaiso.

The presence or absence of the consignee was immaterial. * * *

The answer to the obligation of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts, not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function."

So, where by force of foreign law, a charterer is unable to furnish cargo at the loading port, he is liable, unless the contract contains a proper exception.

Blight v. *Page*, 3 Bos. & P., 295.
Barker v. *Hodgson*, 3 Maule & S., 267.

Northern Pacific R. R. Co. v. *American Trading Co.*, 195 U. S., 439, was a case where, during the war between China and Japan, a consignment of lead, destined for Japan, was not carried forward because a deputy collector of customs refused clearance to the vessel having it on board, under the mistaken idea that it was contraband and could not lawfully be shipped. The carrier was held liable for failure to transport the lead.

In *Ashmore* v. *Cox*, L. R. 1899, 1 Q. B. D., 436, the contract was for shipment of 250 bales of Manila hemp at a certain time. Owing to the Spanish-American War, the shipment could not be made at the time fixed, but the seller was held liable in damages for his failure to ship. The Court (Lord Russell, C. J.) said:

"On behalf of the defendants it was also contended that they were excused from the fulfillment

of the contract on the ground of impossibility of performance. This contention was divided into two heads. First, it was said that it was an implied condition of the contract, and therefore not depending upon the express words of the contract, that it should be possible to ship between the named dates by sailer or sailers. * * *

The defendants have taken upon themselves the absolute responsibility of being able to make a declaration complying with the contract and appropriating to the contract 250 bales of the commodity shipped by sail or sailers between May 1st and July 31st, 1898. They have taken upon themselves (subject to the concluding clause of the contract) the responsibility that those events shall take place, or that they will pay damages if from any cause they are prevented from carrying out the contract. I therefore hold that there was no such implied condition."

This decision has recently been approved in *Blackburn Bobbin Co.* v. *Allen*, 1918, 1 K. B., 540.

So, too, in *Sun Printing Assn.* v. *Moore*, 183 U. S., 642, this Court said that it was a well settled rule of law that, if a party by his contract has charged himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party.

This passage was recently quoted with approval in *Carnegie Steel Co.* v. *United States*, 240 U. S., at 165.

In *Chicago, Milwaukee etc. Ry. Co.* v. *Hoyt*, 149 U. S., 1, at 14, this Court said:

"There can be no question that a party may by an absolute contract bind himself or itself to per-

form things which subsequently become impossible, or to pay damages for the non-performance, *and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract,* or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

In commenting on the above language, this Court in *Columbus Railway & Power Co.* v. *Columbus*, 249 U. S., 399, at 412, said:

"Particular reliance is had upon the last sentence of the paragraph just quoted. This language was used in interpreting a contract of doubtful import, as the context shows. Such interpretation was made in view of the situation of the parties at the time when the contract was made, and in view of the nature of the undertaking under consideration. *It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party.* Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. United States v. Gleason, 175 U. S. 588, 602, and authorities cited; Carnegie Steel Co. v. United States, 240 U. S. 156, 164, 165."

It is plain enough that in the present case the very obvious contingency of requisition might readily have been anticipated and guarded against in the contract.

Numerous other decisions to the same effect might be cited; for example, *Ingle* v. *Jones*, 2 Wall., 1, where a builder failed to complete his work as agreed because of a latent defect in the soil upon which the foundation rested which made it necessary to take down and reconstruct a considerable part of the building. This Court said:

"This covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building 'fit for use and occupation.' It could not be occupied with safety to the lives of the inmates. It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. Beebe v. Johnson, 19 Wend., 500; Paradine v. Jayne, Alleyn, 27; Beal v. Thompson, 3 Bos. & P., 420; 3 Com. Dig., 93."

So in *United States* v. *Gleason*, 175 U. S., 588, at 602, this Court said:

"While we are to determine the legal import of these provisions according to their own terms, it may be well to briefly recall certain well-settled rules in this branch of the law. One is that if a party by his contract charge himself with an obligation possible to be performed, he must make

it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances, can equity interpose. Dermott v. Jones, 2 Wall. 1; Cutter v. Powell, 6 T. R. 320."

And in *Jones* v. *United States*, 96 U. S., 24, this Court said:

"Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, *the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control.*"

In *Berg* v. *Erickson*, 234 Fed., 817, the Circuit Court of Appeals for the Eighth Circuit reviewed the authorities at length and there held that an unusual drought did not relieve from a contract to furnish grass for cattle, there being no exception covering the case.

In *Rederiaktiebolaget Amie* v. *Universal Transp. Co., Inc.*, 250 Fed., 400, the Circuit Court of Appeals for the Second Circuit said:

"No action of the Swedish Government would excuse the defendant from its covenant to do so" (*i. e.*, to deliver a bill of sale), "there being no exception in the agreement like that common in charterparties and bills of lading of arrests and restraints of princes."

A recent case on the subject in New York is that of *Richards* v. *Wreschner,* 174 N. Y. App. Div., 484, where a contract made in this country by a German firm to deliver in this country merchandise manufactured in Germany was held, in the absence of a proper exception, not to be excused by the outbreak of war between Germany and Belgium. The Court adopted the statement of the New York Court of Appeals in *Cameron-Haven Realty Co.* v. *City of Albany,* 207 N. Y., 377, as follows:

"When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it because he promised it and did not shield himself by proper conditions or qualifications."

The converse case is illustrated by *Furness, Withy & Co.* v. *Rederi Banco,* 1917, 2 K. B., 873, where a Swedish ship was chartered to an English firm by a charter-party made in England and containing an exception of restraints of princes. According to Swedish law, the vessel could not lawfully perform the charter because under it she was to carry cargo between two ports both lying outside of Sweden. The Court held that this law constituted a restraint of princes within the meaning of the exception and that therefore the owner was not liable; but it is made clear in the opinion that, if the exception had been absent, the decision would have been to the contrary. The Court said at page 876:

"It is conceded by Mr. Dunlop, and is, I think, quite clear law, that *the mere fact that a contract is illegal by the law of a foreign State to which one of the contracting parties is a subject will not*

make that contract illegal or unenforceable if it is an English contract to be construed according to English law and to be enforced according to the law of this country. Therefore, if it were not for the exception of restraint of princes, the Swedish owners in this case could not rely upon the fact that this charterparty is illegal according to Swedish law. But the charterparty contains the exception of restraint of princes."

A case growing out of conditions due to the recent war is that of *Aktieselskabet Frank* v. *Namaqua Copper Co., Ltd.*, 36 T. L. R., 438 (not yet reported in official series). There discharge of a vessel at a port in Cape Colony was delayed because all the discharging facilities had been taken over by the Government for military purposes. The Court (King's Bench Div.) held the shipowner entitled to demurrage, saying (36 T. L. R., at 441):

"The port of discharge was so situated that it was not improbable that the Imperial or Colonial Government might require to exercise for military ends the control which they in fact did exercise over the port and which they had begun to exercise before the date of the charter-party. If it had been intended that the risk of delay arising from such control should be put on the shipowners and that the cargo owners should be relieved from demurrage so caused, it is not unreasonable to suppose that specific words would have been used that would leave no doubt as to the intention of the parties."

So here, the possibility of requisition must have been contemplated; if it was intended to shift to the charterers the consequences of the owners' failure to perform because of requisition, why did not the parties so state?

In short, the law has long been settled to the effect that, where there is an absolute obligation, difficulty or even impossibility of performance is no defense, except in cases of personal disability preventing performance of a contract for personal service, destruction of the subject-matter upon the continued existence of which the contract depends, and prohibition by domestic law.

There is no question here of the first or the third of these alternatives. The District Court sought to bring the case within the second, and in its opinion (pp. 236-237, fols. 708-709) argued that "for the purposes of this suit, the *Ogilvy* was or became non-existent."

This suggestion is more fully discussed below (pp. 38-40). It will suffice at this point to say that the ship did not *cease to exist*, any more than if she had been delayed by stranding or by collision, or by any other obstacle. She was merely subjected to a restraint (assuming that the requisition was valid) of a kind not excepted in the charter and not permanent in its nature. Such a situation cannot possibly be treated as an instance of destruction of the subject-matter of the contract. It is simply a case where performance has been rendered impossible for the moment by foreign law.

2. *Prevention by foreign law not a defense.*

It seems hardly necessary to go into an extended discussion of the principle which has been settled so long and so definitely, that prevention of performance by foreign law is no excuse. This contract was an American contract, made in New York, and deriving its obligation from the law of

the State of New York. This Court is an American court, asked to enforce the contract. The performance of the contract was to begin in this country. The defense is that the law of another country, to wit, Great Britain, has interposed an obstacle. It makes no difference whether that law is a municipal regulation, an act of Parliament, an Order in Council or a so-called prerogative of the Crown. It is immaterial whether the law is British or French or Russian. The case presents merely another instance of prevention by foreign law of the performance of an American contract—the same situation which has been so often and so uniformly dealt with by the courts both of this country and of England. The law is that if a foreign government says to one of the parties to a domestic contract: "We will not let you perform your obligation," the domestic court will say, "We do not recognize that a foreign power may destroy the obligation of our contracts and deprive our citizen of the benefit of his bargain. The contract must be performed or damages must be paid."

If it be suggested that the fact that the cargo was to be discharged in British South Africa affects the question, the answer is found in the words of Mr. Justice Willes, in *Lloyd* v. *Guibert,* 6 Best & S., 100, where a contract of carriage required discharge at Liverpool. The Court held that the law of England as the place of discharge did not govern the case because it was "manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby." This passage is quoted and relied upon

by this Court in *Liverpool* v. *Great Western Co.* (the *Montana*), 129 U. S., 397.

See too *China Mutual Ins. Co.* v. *Force*, 142 N. Y., 90.

The text writers are unanimous in laying down the rule that prevention by foreign law is no excuse. The following quotations from standard works will suffice:

8 *Elliott on Contracts*, par. 1891:

"Impossibility of performing a contract caused by a foreign law is no excuse for non-performance."

2 *Parsons, Contracts*, 9th ed., p. 828:

"It would seem that a prevention by the law of a foreign country is no excuse, because this does not make the act unlawful in the view of the law which determines the obligation of the contract."

Leake, Contracts, 6th ed., p. 510:

"An impossibility caused by foreign law or by the act of a foreign state does not discharge a contract in this country."

To the same effect:

Wald's Pollock on Contracts, 3rd ed., p. 530.

Williston, Sales, Sec. 661.

Scrutton on Charter-parties, 9th ed., p. 11:

"If performance of the contract is rendered impossible by foreign law, a party cannot plead impossibility or illegality as a defense to a claim for breach of contract."

In the recent case of *Richards & Co.* v. *Wreschner*, 174 N. Y. App. Div., 484, at 488 (referred to at p. 24, *supra*), it is said:

"It is well settled that impossibility due to foreign law is no excuse."

The adjudicated cases to the same effect are many.

In *Kirk* v. *Gibbs*, 1 H. & N., 810, a charter-party provided that the vessel was to proceed to a Peruvian port, and there get a required pass and load a cargo of guano. Owing to the law of Peru, the defendant could not get the pass except for a part cargo. It was held that this was no excuse. The Court said:

"The obligation was on the defendant to get the pass."

In *Barker* v. *Hodgson*, 3 M. & S., 267, the charterer was to furnish a cargo at a certain Spanish port, but was prevented from doing so because all intercourse with the port was forbidden owing to an epidemic. Impossibility of performance by reason of this law was pleaded, but the Court said:

"If, indeed, the performance of the covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and the defendant, inasmuch as he had been thus compelled to abandon the contract, would have been excused for the non-performance of it, and not liable for damages. But if in consequence of events which happened at a foreign port, the freighter is prevented from furnishing or loading that which he has contracted to furnish, the contract is neither dissolved nor is he excused for not performing it, but must answer in damages."

Barker v. *Hodgson* was cited with approval by this Court in *Gates* v. *Goodloe*, 101 U. S., at 620.

In *Benson* v. *Trundy*, 13 Md., 20, a charterer was held liable for failing to furnish a cargo of guano from Peru in spite of the fact that its export was forbidden by the Peruvian Government. The Court followed the English rule as laid down in *Barker* v. *Hodgson*, 3 Maule & S., 267, basing the liability on the fact that the contract "contains no saving clause to meet the contingency" (p. 52).

And in *Clifford* v. *Watts*, L. R. 5 C. P., 577, 586, the Court commented on *Barker* v. *Hodgson*, saying, per Willes, J.:

"If the intercourse with the foreign port had been prohibited by the law of this country, the act would have been illegal, and the defendant would have been excused, not because he could not, but because he ought not to do it. But, where the performance of the thing covenanted to be done is not made impossible by the law of this country, the case falls within the principle laid down in the leading case of Paradine v. Jane, where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by alien enemies, and his plea was held insufficient."

In *Hare* v. *Whitmore*, 2 Cowp., 784, it was held that a foreign embargo would not excuse a breach of a warranty to sail by a certain date. In *Atkinson* v. *Ritchie*, 10 East, 530, it was held that a foreign embargo was not a defense to a suit for breach of a contract to load.

In *Blight* v. *Page*, 3 Bos. & P., 295, where the defendant had agreed to load a full cargo of barley at Libau, Russia, it was held no defense to an ac-

tion for freight that the Russian Government forbade the export of barley. To the same effect is *Sjoerds* v. *Luscombe,* 16 East, 201, where the Court said:

"if the freighter undertake what he cannot perform, he shall answer for it to the person with whom he undertakes."

In *Jacobs* v. *Credit Lyonnais,* L. R. 12 Q. B. D., 589, 20,000 tons of Algerian esparto were to be shipped by a French company. There was an insurrection in Algeria and the transport of esparto was forbidden. This would have been a defense under French law; but the Court held a plea setting forth these facts to be bad on demurrer. This decision has recently been approved as representing the law of England to-day (*Blackburn Bobbin Co.* v. *Allen,* 1918, 1 K. B., 540, at 551).

An interesting recent case on the subject of foreign law as affecting a domestic contract is that of *Trinidad Shipping Company* v. *Alston & Co.,* 1920 App. Cas., 888. There, by virtue of a contract made in British territory, a shipper was entitled to collect from a carrier a deferred rebate on the freight of goods shipped from Trinidad to New York. Payment of such rebates was illegal under the Act of Congress of September 7, 1916, passed, apparently, subsequent to the date of the contract. The Privy Council held that the Act of Congress did not relieve the carrier of the obligation to make the payment. The ground of the decision was that the obligation of a British contract could not be cut off by a law of the United States. This is precisely the proposition which the charterer advances in the case at bar.

This decision may be contrasted with the decision of the Court of Appeal in *Ralli Bros.* v. *Compania Naviera* (1920), 2 K. B., 287, where it was held that a contract requiring one Spaniard to make to another Spaniard in Spain a payment illegal under Spanish law is not enforcible. The distinction between this case and the *Trinidad Shipping Co.* case is, of course, that in the former, but not in the latter, the act contracted for was illegal by the law of the place of performance and both parties owed allegiance to that law. Obviously in this respect the case at bar resembles the *Trinidad* case. The present charter is not governed by the law of England and was not to be performed in English territory. The fact that the cargo was to be discharged in a British possession does not make the contract subject to British law (see *Lloyd* v. *Guibert*, 6 Best & S., 100, referred to and quoted p. 30, *supra*; also *The Montana*, 129 U. S., 397, p. 31, *supra*).

The American cases, some of which have already been referred to, are even more strict than the English.

In *Duff* v. *Lawrence*, 3 Johnson's Cas., 162, where loading was prevented by war, Kent, J., said, page 172:

"If, therefore, the prohibition in question had arisen from our own Government either before or after the commencement of the voyage, it would have dissolved the contract. But as it arose from the government of another country, it does not dissolve, nor absolutely excuse the performance of the contract, because the laws of one nation do not give effect to the positive institutions of another inconsistent with its own."

In *Holyoke* v. *Depew*, 2 Ben., 334, Fed. Cas. No. 6652, a vessel was chartered for a voyage to the

Canary Islands and return, the charter containing no restraints of princes clause. The authorities at the Canaries would not permit the vessel to load unless she would first go to Spain for quarantine, which the master refused to do. *Held* (Blatchford, J.) that the owner was liable, because, there being no restraints clause, he had made an absolute engagement to take the cargo and could not plead the act of the authorities as an excuse. The Court said:

"In the absence of any clause exempting the vessel from liability because of the restraints of rulers and princes, I think the fault was hers in not being in a condition to receive the barilla, and that her owners and not the charterer must bear the loss. Ogden v. Graham, 31 L. T. Q. B. pt. 2, p. 29; Spence v. Chodwick, 10 Q. B. 528; Brooks v. Minturn, 1 Cal. 484."

In *Beebe* v. *Johnson*, 19 Wend., 500, the defendant sold to the plaintiff certain patent rights, agreeing to perfect them in England so as to secure to the plaintiff the exclusive rights in Canada. This could not be done because by the British law such exclusive rights could be granted only to British subjects. It was held, however, that this foreign law was no defense. This decision was cited with approval by this Court in *The Harriman*, 9 Wall., 161.

See, too, *Ye Seng Co.* v. *Corbitt*, 9 Fed., 423-430, where a shipowner had entered into a contract to carry coolies from China to the United States and it was held no defense that the Chinese authorities refused to permit the vessel to carry passengers.

In *Tweedie Trading Co.* v. *MacDonald*, 114 Fed., 985, the contract was to carry laborers from Bar-

badoes to Colon on four separate trips. After two trips had been made the Government of Barbadoes forbade the further carriage of laborers. It was held that this was no excuse in a suit for the charter money. The Court said (p. 988):

"Prevention by the law of a foreign country is not usually deemed an excuse when the act which was contemplated by the contract was valid in view of the law of the place where it was made and *a fortiori* when it was also then valid at the place of performance."

The cases of *Spence* v. *Chodwick* and *Richards & Co.* v. *Wreschner* have already been referred to (pp. 20, 27, *supra*). The latter is cited with approval by the Circuit Court of Appeals for the Ninth Circuit in *Swayne* v. *Everett,* 255 Fed., 71, at page 74, where the Court says:

"At the time of the occurrences in question, England and Germany were at war, but the United States was not; on the contrary, this country was then observing strict neutrality between those belligerents. How, then, can it be properly held that the performance of the clear legal duty of an American carrier to receive and transport goods tendered for carriage by an American citizen is excused on the ground that the British government had forbidden its citizens and corporations, one of which happened to be the agent of the American carrier, from receiving the tendered freight and providing for its transportation? Such is not the law as we understand it. See Richards & Co., Inc. v. Wreschner, 174 App. Div., 484, and the numerous cases there cited."

So here the right of an American citizen to have his contract performed is not destroyed by the fact that a foreign government has instructed the other party to the contract not to carry it out. The own-

ers did not guard themselves against that contingency and the loss should fall on them.

A striking example of the rule is supplied by the oft-cited case of *Taylor* v. *Taintor*, 16 Wall., 366, where a man was indicted in Connecticut, was released on bail, and, while on bail, was convicted on another charge and imprisoned by the authorities of the State of Maine. It was held no defense to his bondsman in Connecticut that they were prevented from producing him by the action of the Maine authorities in putting him in prison. The rule was concisely stated in the majority opinion as follows (p. 371):

> "The law which renders the performance impossible, and therefore excuses failure, must be a law operative in the state where the obligation was assumed, and obligatory in its effect upon her authorities."

The foregoing authorities indicate what has always been considered clear law—that, in the absence of an exception in the contract, the interference of a foreign government preventing the performance of the contract is not a legal excuse. This is well settled both in England and in this country.

As already pointed out, the District Court sought to bring the present case within the authorities by calling it a case where the vessel had become non-existent. This is a mere figure of speech. It might equally well be said that, whenever the act of a foreign government prevents the loading of a cargo, that cargo is non-existent, and yet in case after case it has been held that liability exists under such circumstances. Indeed, any case of impossibility might be stated in the same sort of figurative

language. Whenever a thing cannot be done, or carried, or secured, that thing is, for the purposes of that contract, non-existent. It cannot be put to the expected use. I agree to deliver a certain ship to a purchaser. If the ship is burned up, I am ordinarily excused. But if the ship exists, and I cannot deliver because I cannot get her, then I have broken my contract. It will not do for me to say, "I cannot get this ship to deliver to you; therefore the ship is, for our purposes, non-existent, and therefore our contract is at an end." Any case of impossibility, almost any case of breach, might be set forth in similar terms. Such a figurative phrase does not conduce to clear thinking and does not advance the solution of the problem. Where there is truly destruction of the subject-matter, a peculiar situation is created, with which the law usually deals by declaring, as the fairest solution, that the contract is annulled. But where, the subject-matter being intact, an obstacle arises to performance by one party, the question is: Is the nature of the obstacle such that, under the law or according to the provisions of the contract, the default is excused? The law both of this country and of England is that prevention by foreign law does not excuse. Unless, therefore, well-settled law be overruled or unless an exception to the ordinary rule be created, the shipowners in the present case are not absolved from liability by the act of the British Government.

It seems unnecessary to refer more particularly to the extract from the Defense of the Realm Act, pleaded in the answers, folios 32-33, and printed in the record at pages 206-207. It declares that, where performance of a contract is interfered with

by any requirement of the Admiralty, etc., that fact shall constitute a defense. Of course the statute has no effect on an American contract in suit before an American court. The same observations apply to the Courts (Emergency Powers) Act, printed at pages 208-213.

To summarize the argument thus far—even if it be assumed that there was a valid requisition and that the vessel was operated under it, still the shipowners are clearly liable under the authorities, because they assumed by their contract an absolute liability; they did not guard against the very probable contingency of requisition; and the only defense suggested—namely, prevention by the act of a foreign government—is not, according to well-settled principles, a defense at all.

SECOND.

There was no frustration of the charter.

The contention of the owners will doubtless be that, admitting that foreign law is not a defense ordinarily, still the principle of frustration applies, and that such frustration may result from the act of a foreign government or from foreign law. It will be noted that the cause said to have brought about the frustration in the present case was one which must have been within the contemplation of the parties, and yet one which they did not except in framing their contract.

The general principle is unquestionably as stated in the last point—namely, that an absolute obligation must be performed unless performance is pre-

vented by destruction of the subject-matter, by domestic law, or by the act of the other party. If the doctrine of frustration is applied to cases where performance is prevented by foreign law, then either the general rule must be overturned (which is inconceivable) or else such cases must be treated as exceptional, and a new rule of law must be established to cover them.

The doctrine of frustration appears to be an effort to correct what, in some cases, has been regarded as the injustice of enforcing a contract under circumstances fundamentally different from those which the parties foresaw or could reasonably have been expected to foresee. Manifestly, it is to be applied with great caution. The Courts have usually sought to express the doctrine as one of "implied condition" in the contract; or as an attempt to effectuate what the Court believes to be the intent of the parties—*i. e.*, to write the contract as the Court thinks that the parties would have written it, if they had framed a provision designed expressly to cover the contingency which actually arose. In spite of these attempts, by the use of conventional phraseology, to bring the doctrine of frustration within the general powers of the Court and to make it appear that the Court is merely construing and enforceng a contract already made by the parties, the plain fact is that the Court is making for the parties a new contract; or, perhaps more accurately, declining to enforce, for equitable reasons, the contract which the parties themselves have made.

The general rule is that absolute obligations must be enforced. To relax this rule unduly is, obviously, to extinguish the obligation of contracts.

Only in a case of the plainest need should such a remedy be applied, and it should never be applied to a case where the parties must have had the contingency in contemplation and simply failed to provide for it. Under those circumstances, it is submitted, no Court can annul this or any other contract.

The so-called doctrine of frustration is really new in name rather than in nature. Nearly all the cases are simply instances of the well recognized types of impossibility already discussed (prevention by domestic law, destruction of subject-matter, etc.), expressed in the phraseology of frustration, or cases falling within the excepted causes. *The Allanwilde*, 248 U. S., 377 (further discussed *infra*, p. 43), for example, a case on which the owners rely here, is nothing but a case of prevention of performance by domestic law expressed in terms of frustration. The same is true of every one of the English requisition cases. None of the American cases and few of the English, have ever held a contract frustrated by a cause not excepted by the parties, and not falling within the categories already discussed. Nor is frustration applied to cases where the obstacle was readily foreseeable. And finally, no Court anywhere has ever held a contract frustrated unless the obstacle clearly appeared to be such as necessarily to postpone the performance of the contract beyond the time when it would be fair or reasonable to require the parties to perform it.

With these thoughts in mind, a brief review of the leading American and English cases may be of value.

American Cases.

The owners apparently rely on *Atlantwilde Transport Corporation* v. *Vacuum Oil Co.*, 248 U. S., 377. There oil had been shipped by schooner from New York for France during the war. The vessel, after sailing, was obliged by heavy weather to put back and thereafter was prevented from resuming her voyage by an embargo laid by the United States Government. The suit was brought to recover back prepaid freight. It was held that, under the contract of carriage, the freight was not recoverable and, further, that the contract was frustrated.

This is obviously a case where performance was prevented by domestic law and, according to well-settled rules already discussed, the obligation of the contract was at an end. It should be noted that the delay was evidently going to be of indefinite and prolonged duration, and that this Court considered that the decisive factor. This Court said (p. 386):

"The duration was of indefinite extent. Necessarily the embargo would be continued as long as the cause of its imposition—that is the submarine menace—and that as far as then could be inferred would be the duration of the war of which there could be no estimate or reliable speculation. The condition was therefore so far permanent as naturally and justifiably to determine business judgment and action depending upon it."

This is in line with other decisions referred to below, to the effect that a delay which by its very nature will last as long as an existing war, is such a delay as to bring about frustration, provided that the other necessary elements are present.

In *North German Lloyd* v. *Guaranty Trust Company*, 244 U. S., 12, no question of frustration arose. It was held there that the master of a German steamship had not been guilty of a breach of contract, when he abandoned his voyage and sought a neutral port upon the eve of the war and in the face of reasonable apprehension of capture. It will be noted that in this case the outbreak of the war could not reasonably have been apprehended at the time when the contract was made. The contract also contained the exception of restraints of princes.

In *Columbus Railway Co.* v. *City of Columbus*, 249 U. S., 399 (already referred to, p. 24, *supra*), a street car company which was under contract to furnish service at a fixed rate, sought to have its contract terminated because the War Labor Board had raised the wages of its employees so as to render the rates inadequate. This Court declined to hold the contract terminated, saying (p. 412):

"Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation the terms of the contract must prevail."

In *Earn Line* v. *Sutherland SS. Co., Ltd.*, 264 Fed., 276, the steamship *Claveresk* was under time charter. The charter excepted restraints of princes. It had been made in 1913, prior to the war, at a time when the war conditions could not have been foreseen. The vessel was requisitioned by the British Government. The Circuit Court of Appeals for the Second Circuit held that the contract was at an end, basing its decision upon the finding of fact that—

"in January-February, 1917, having regard to the then violence of German submarine warfare on merchant vessels, and the success thereof, no reasonable man would have expected or even dared hope that the *Claveresk,* once taken into Government service, would be released for any use contemplated by the charter of 1913, before the expiry of the term of that charter."

It will be noted that in this case (1) the cause was excepted; (2) the actual conditions could not reasonably have been foreseen when the contract was made; (3) the detention of the ship was proved to be such as to make it impossible to resume performance of the charter until after the expiration of the whole charter period. The Court did not hold, nor, it is submitted, can any court reasonably hold, that *the mere fact of requisition,* without more, extinguishes a charter. Under even the most liberal view of the frustration doctrine, it must be proved that performance has become so clearly and hopelessly remote as to warrant the court in putting into the contract a new condition and calling it frustrated.

This case goes further, it is believed, than any case in our courts. In the *Isle of Mull,* 257 Fed., 798, practically the same question was decided the other way by Judge Rose in the District of Maryland. He held that the charter was not frustrated and required the owner to account to the charterer for the vessel's earnings.

In *Lewis* v. *Mowinekel,* 215 Fed., 710, the vessel was under a time charter for a period of one year, which had not yet begun. The vessel stranded under circumstances such that there was imminent

danger that she would become a total loss. She was finally floated and repairs were completed after the expiration of more than a year—at a time when performance of the charter in question would, in the ordinary course, have been finished. The charter-party contained an exception of perils of the sea. It was held that the owners of the ship were under no obligation to enter upon the performance of the charter when the repairs had been completed. The Circuit Court of Appeals for the Second Circuit said:

"The delay was caused by a peril of the sea excepted in both charters, and the owner was therefore relieved. Certainly it was not contemplated by the parties that they were entering into a charter which could be interpreted to begin a year after the expiration of the Munson charter. We agree with the District Court in thinking that the stranding of the steamer, in such circumstances as to induce her owners to believe that she would become a total loss and in any event to make her employment impossible for many months, released them from liability under the charter. It excused both parties, but did not make a new contract."

Here again the cause of the delay was one excepted by the contract and the delay was so long as to make performance of the contract thereafter unreasonable.

English Cases.

The same fundamental requisite of "inordinate" postponement or unreasonably delayed performance is emphasized throughout the English cases.

In the case of *Admiral Shipping Co.* v. *Weidner & Co.*, 1916, 1 K. B., 429, at 436, 437, Mr. Justice

Bailhache gave the following definition of frustration, which has since received judicial approval in other courts:

"The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so *inordinately postponed* that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made."

Apply this to the case at bar: (1) The charterers' purpose was to get oil carried; the owners' was to earn freight. Neither of these objects would be frustrated by delay. (2) The delay was certainly not "unforeseen." All the world knew, when this charter was signed, that requisitions were common enough. (3) There is no evidence that the fulfilment would have been "inordinately" postponed, or that any postponement would in the slightest degree have affected the objects which the parties had in view. The case does not in the least fall within the definition.

The fundamental test under this definition is the effect on the contract of the probable delay involved. That is the question chiefly considered in all the frustration cases. A contract is never held to be dissolved unless the delay is plainly going to be so long as to make the contract a different contract and to defeat the objects of the parties. Thus, in the leading case of *Jackson* v. *Union Marine Ins. Co.*, L. R. 8 C. P. 572; L. R. 10 C. P.,

125, a vessel en route to her loading port stranded on January 3rd was floated on January 4th, very badly damaged, and was still under repair at the time of the trial in August. The jury found that the delay had been so long as to make it unreasonable to require the charterer to furnish a cargo after repairs were finished, and on this finding the Court held that the shipowner could not enforce the charter. In the Exchequer Chamber, the ground of decision is stated as follows by Bramwell, B.:

"I understand that the jury have found that the voyage the parties contemplated had become impossible; that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage; not, indeed, different as to the ports of loading and discharge, but different as a different adventure—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage."

As was said by Viscount Haldane in *Bank Line* v. *Capel & Co.*, 1919, App. Cas., 435; 14 Asp. M. Cas., 370:

"Whether frustration has taken place is always a question which depends on the circumstances to which the principle is to be applied, rather than upon abstract considerations."

The question must, therefore, be decided on the facts of each case; but frustration is not lightly to be found. Lord Sumner in the *Bank Line* case, *supra,* puts it accurately in saying that:

"When the causes of frustration have operated so long or under such circumstances as to raise a

presumption of *inordinate delay,* the time has arrived at which the fate of the contract falls to be decided."

In other words, requisition alone is not enough. Either the frustrating causes must operate for a long time or the circumstances must be such as to make it plain that they will so operate as to produce "inordinate delay." There are no facts in this case on which such a finding could be based.

In the leading case of *F. A. Tamplin SS. Co.* v. *Anglo-Mexican Co.*, 1916, 2 App. Cas., 397, the question was whether a time charter which contained a restraints of princes clause was abrogated by requisition of the vessel. Even though the contract was made before the war, when requisition could not have been within the contemplation of the parties, it was held by a majority of the Law Lords that the interruption was not shown to be of such a nature and duration as to end the contract. Both the majority and the dissenting opinions emphasized as the important question whether the interruption was of such a character as to render further performance unreasonable. Thus Earl Loreburn said (p. 403):

"In applying this rule it is manifest that such a term can rarely be implied except when the discontinuance is such as to upset altogether the purpose of the contract."

At page 405:

"On the other hand, if the interruption can be pronounced, in the language of Lord Blackburn already cited, 'so great and long as to make it unreasonable to require the parties to go on with the adventure,' then it would be different. * * * Taking into account, however, all that has happened, I can-

not infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on."

And so Viscount Haldane, one of the dissenting Judges, said (p. 407):

"But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as wholly dissolved."

Where it has been clear that the delay must of necessity last for *the entire period of a war,* the contract has been generally held frustrated. In *Geipel* v. *Smith*, L. R. 7 Q. B., 404, Lush, J., said:

"A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial venture like this."

To the same effect, *The Allanwilde*, *supra*, p. 43.

So where a British vessel was in a Baltic port at the outbreak of the recent war, it was said (per Swinfen Eady, L. J.) that "the enforced delay by reason of the war is of such long and indefinite duration as completely to frustrate the adventure in a mercantile sense." (*Admiral Shipping Co.* v. *Weidner & Co.*, 1917, 1 K. B., 222; 13 Asp. M. C., 539; *Scottish Navigation Co.* v. *W. A. Souter & Co.*, 1917, 1 K. B., 222; 13 Asp. M. C., 539.) There the delay had already lasted for some three months before the matter of frustration was brought up. So in *Countess of Warwick SS. Co.* v. *Le Nickel Societe Anonyme* and *Anglo-Northern Trading Co.* v. *Emlyn, Jones & Williams*, 1918, 1 K. B., 372;

14 Asp. M. Cas., 242, where frustration was found, it was proved by the testimony of shipping experts that there was no hope of the vessel's release until the war was ended.

In *Bank Line* v. *Capel & Co.*, 1919 App. Cas., 435, the charter was for twelve months. The vessel was requisitioned at about the time when she would have entered upon performance. It was held by a divided Court that the charter was terminated because detention had already lasted so long (about four months) as to make performance at its termination performance of a different contract. Lord Wrenbury expressed the opinion (p. 461) that the contract would continue for a reasonable time—say, two months—but that four months was more than a reasonable time.

In considering the present case, it must be remembered that it came up early in the war. At that time there was not the terrible scarcity of tonnage that occurred two years later. In this case there was no reason to expect detention for the duration of the war. In fact, the vessel was released at the end of October, 1915, as soon as she had finished the four voyages for which her owner had committed her. In various other cases—*e. g.*, *Modern Transp. Co.* v. *Duneric SS. Co.*, 1917, 1 K. B., 370—vessels were released after short periods of service. Other instances appear in the case of *Chinese Mining Co.* v. *Sale*, L. R. 1917, 2 K. B., 599; 22 Com. Cas., 352. There the steamer *Albiana* was requisitioned in July, 1915, released in September, and not again requisitioned until December, 1916. The *Wimbledon* was requisitioned in August, 1914, released in December, 1914, and again taken in January, 1916. These instances show that the release

of the *Baron Ogilvy* after two months' service was quite possible. That would have been on June 10th, less than a month after the cancelling date.

The next two cases referred to are of particular importance as showing anew that frustration cannot be found unless the interruption be of such duration as to prevent performance for an unreasonable or "inordinate" time.

In *Miller & Co.* v. *Taylor & Co.*, 32 T. L. R., 161; L. R., 1916, 1 K. B., 402, the contract was for the purchase of confectionery for export, delivery to be in August and September, 1914. War began on August 4, 1914. On August 10, the Government forbade the export of sugar; on August 14, the plaintiffs (vendors) cancelled the contract. On August 20, the embargo on sugar was lifted. The plaintiffs claimed that the contract was destroyed by the embargo; but the Court of Appeal unanimously held the contrary, saying:

"In the present case, if the interruption had been such that the contracts could not be carried out within a reasonable time, that would have sufficed to invalidate the contracts. If, on the other hand, the interruption was not such as to have that effect, there was not such an interruption as would annul the contracts. The contracts here were to manufacture goods in a reasonable time. No time was specified in the contracts, and the usual course of business between the parties was that goods should be delivered within six or eight weeks. The duty of the plaintiffs after the Proclamations of August 5 and 10 was to wait a reasonable time to see if they could carry out the contracts, and if they had done this the result would have been that the contracts would have been duly carried out. The suspension of the power to export confection-

ery was for a very short period, and would not have prevented the contracts from being carried out in the manner contemplated by the parties."

In *Austin Baldwin & Co.* v. *Turner & Co., Ltd.*, 36 Times L. R., 769, K. B. Div., 1920 (not yet reported in official series), the contract was for the sale by an American firm to a British buyer of a quantity of saccharin, to be delivered monthly during 1919. The contract was made about October 1, 1918. There was some indication in the correspondence that the buyer was to take the responsibility of procuring from the British authorities an import license. In October, 1918, the buyer applied for such a license and was refused. On December 5, the buyer wrote to the seller cancelling the contract. On December 20, the restrictions on the importation of saccharin were removed. The buyer claimed frustration. The Court said:

"Does the refusal of a permit amount to frustration? I do not think it necessary to deal in detail with the decisions. *All are based on this principle: either that there is an implied term that a certain state of things shall continue to exist, or that there is an express or implied term that in a certain event the contract may be rescinded.* Here the certain event is said to have been the non-granting of a license. In my opinion it was not an implied term that the contract should be rescinded if a license was not granted. The defendants expressly and as part of the contract took the risk of obtaining a permit, and it does not lie in their mouths to say that the contract was frustrated because they could not do so. Without going into the cases in detail I come to that conclusion on the general principle underlying them. Even if it could have been made out that in November or October there was a frustration of some venture it was not of *this* venture,

which was not a contract for the export of saccharin in October and November, and it appears that by December 20 all restrictions had been removed, and by January 1 there was absolute freedom and no restriction on the carrying out of this contract. *I think it was the defendants' duty to wait a reasonable time to see if permission could have been granted later.* I find as a fact that December 20 would have been a reasonable time."

While it is true that, in the case last cited, the buyer had taken the risk of failure to procure a permit, still the opinion emphasizes the principle underlying frustration cases, namely, that the delay must be a destructive delay and that it is necessary "to wait a reasonable time to see if permission could have been granted later," unless, at least, the very nature of the detaining cause is such as to make destructive delay a certainty.

In *Lloyd Royal Belge* v. *Stathatos*, 33 Times L. R., 390, a Greek vessel, under charter for a voyage from Gibraltar to the United States and return to a French port, was detained "by the authorities at Gibraltar by reason of a general decision arrived at by the British Government to detain Greek ships in consequence of the situation that had arisen between the Allies and the Greek Government." It was held by the Trial Court that this was a detention "for reasons of State, which would not be fully known to the parties, and for a period the duration of which must be uncertain and might be prolonged," and amounted to a frustration. The Court referred to the fact that the boat was, to the knowledge of both parties, intended to fulfill a definite voyage on a regular schedule (pp. 390, 391). The Court of Appeal affirmed (34 Times L. R., 70), apparently with some hesitation, saying that the case was a close one. The charter was sub-

ject to restraints of princes and the obstacle was the act of the domestic government.

The following cases indicate that even prolonged detention or absolute change of circumstance does not of necessity bring about frustration.

In *Blackburn Bobbin Co.* v. *Allen Co.*, 1918, 1 K. B., 540, a contract was made before the war for sale of a quantity of Finland timber. The outbreak of war made the importation of such timber impossible. The sellers claimed that the contract had been dissolved by the outbreak of the war. The opinion of the Court (McCardie, J.) discusses the doctrine of impossibility of performance at great length and holds that the contract in suit was not extinguished by the outbreak of the war. His decision was affirmed by the Court of Appeal (1918, 2 K. B., 467).

In *Hudson* v. *Hill*, 2 Asp. M. C., 278; 43 L. J. C. P., 273, there was a voyage charter under which lay days were to begin on April 1st. Owing to bad weather and other difficulties, the vessel did not reach the loading port until July 28th. Held, no frustration—charterer must load.

To the same effect is *Jones* v. *Holm*, 2 Ex., 335, where a vessel, after arrival at the loading port in March, took fire and was not repaired until July 30th. It was held that the charterer was bound to load and that the charter was not ended.

So in *The Progreso*, 50 Fed., 835, it was held that a delay of a month, due to quarantine, did not terminate the charter. The charter was a voyage charter and the charterer had an option to cancel

if the vessel did not arrive on or before October 1st. There was a restraints clause. The authorities at the loading port imposed a quarantine which extended for a month beyond the cancelling date. It was held that the charter was not thereby terminated and that the shipowner was liable for refusing to perform.

And see:

The Star of Hope, 1 Hask., 36; Fed. Cas., 13312 (where delay in reaching loading port, due to heavy weather, held not to terminate contract).

Hadley v. *Clarke*, 8 Term R., 259 (prolonged embargo held not to dissolve contract of carriage).

The Patria, L. R. 3 Adm. & Ecc. (where even a blockade of the port of destination was held not to terminate a charter).

Hurst v. *Usborne*, 25 L. J. C. P., 209; 18 C. B., 144 (delay of several months in reaching loading port did not frustrate).

Assicurazioni Generali & Co. v. *Bessie Morris SS. Co.*, 7 Asp. M. C., 217; 1892, 2 Q. B., 652 (where stranding, partial submergence of the vessel and delay of nearly two months for repairs did not frustrate).

Clark v. *Mass. Fire & Marine Ins. Co.*, 2 Pick., 104 (where delay of two months for repair, causing the charterer to lose the object of the voyage, did not frustrate).

In 3 Kent Com., 14 Ed., Sec. 249, it is said:

"But a temporary impediment of the voyage does not work a dissolution of the charterparty; and an embargo has been held to be such a temporary restraint, even though it be indefinite as to time. The same construction is given to the legal operation of a hostile blockade, or investment of the port of departure, upon the contract. It merely suspends the performance of it, and the voyage must be broken up or the completion of it become unlawful, before the contract will be dissolved. If the cargo be not of a perishable nature, and can endure the delay, then the general principle applies that nothing but occurrences which prevent absolutely the execution of the contract will discharge it. The parties must wait until those which merely retard its execution are removed."

The greater part of the English cases where the defense has been upheld fall plainly within the recognized categories of prevention by domestic law, destruction of subject-matter, etc. Manifestly all the requisition cases are cases where performance was prevented by domestic law, and nearly all of the other cases cited on behalf of the owners come within the same classification. Thus in *Shipton, Anderson & Co.* v. *Harrison Brothers*, 21 Com. Cas., 138, the contract was for sale of a specified lot of wheat, which was thereafter requisitioned by the British Government. Since the use of wheat necessarily destroys it, such requisition was, of course, merely a case of destruction of the subject-matter.

So in *Nickoll* v. *Ashton & Company*, 1901, 2 K. B. D., 126, a contract for shipment by a specified steamer at a definitely fixed time was held to be a case of destruction of the subject-matter, where the vessel in question was stranded and so

seriously damaged that she could not be repaired in time to carry the cargo at the time fixed.

So in *Taylor* v. *Caldwell,* 3 B. & S., 826, where the lease of a music hall was held terminated by the destruction of the building by fire, the case obviously falls within the recognized categories.

In *Metropolitan Water Board* v. *Dick Kerr & Co.*, 1918, App. Cas., 128, where there was a contract for the construction of a reservoir and the British Ministry of Munitions ordered the work stopped and the material sold to munition factories, the case was clearly one of prevention of performance by domestic law.

In no case has the defense of frustration been upheld where the situation has been what it is here: (1) American contract, in suit in an American court, sought to be terminated by foreign law; (2) charter made in contemplation of an existing war and at a time when requisitions were matters of daily occurrence; (3) no restraints clause; (4) a charter which required the ship to tender even if she were behind her cancelling date; (5) requisition occurring five weeks before the cancelling date, with some intimation that it would continue for a few weeks only ;(6) no evidence that the requisition would be prolonged; (7) voluntary fixture by the owners for a six or seven months' service; (8) total repudiation of the charter *at once.*

In order to succeed under the facts of this case, the owners must establish that the *mere fact* of requisition, *ipso facto* and without more, as matter of law, terminated the charter. Without an exception, without proof of the probable length of the requisition, without any facts in the record from which the Court can reach a conclusion about

its probable length, there is nothing here but the mere fact that the vessel *was requisitioned.* No case has ever held that this alone is enough to accomplish frustration; numerous cases have held the contrary.

That the mere fact of requisition is not enough is shown (if proof be needed) by the cases in which charters have been held to survive requisition—*e. g., Tamplin Co.* v. *Anglo-Mexican Co.,* 2 App. Cas., 397; *Modern Transp. Co.* v. *Duneric SS. Co.,* 1917, 1 K. B., 370; *Chinese Mining Co.* v. *Sale,* 1917, 2 K. B., 599; 22 Com. Cas., 352; and see p. 49, *supra.*

If a physical obstacle to the performance of a charter arise—such as stranding or collision—which may or may not cause long detention, no one would claim that the charter is ended without some evidence as to the probable duration of the delay. Why is it different with a legal obstacle? In case of the stranding or collision, the delay would be excused if the charter contained a suitable exception, but the obligation to perform would persist unless and until it became evident that extraordinary delay would ensue. The present, too, is a particularly strong case because the cancelling clause (quoted above, p. 2) plainly indicates that, even though the ship might be delayed beyond her cancelling date, it was the duty of the owner to tender her at the loading port, and that the charterers would then be entitled to make their election as to cancellation. Moreover, the cancelling date was still five weeks away. Yet here the owners absolutely and finally repudiated the charter as soon as they had made their arrangements with the Admiralty.

All the decisions in requisition cases turn on the probable duration of the requisition. Either this is established by evidence or, if sufficient information appears in the record, is found by the Court from the circumstances. Unless in one way or another it appears that the requisition will last for an unreasonably long time, the contract stands unaffected. So in *Modern Transportation Co.* v. *Duneric SS. Co.*, 1917, 1 K. B., 370; 13 Asp. M. C., 490, the charter was for a year. The vessel was requisitioned after five months' service and released after six months. It was held that the charter was not ended.

Such cases, while recognizing the principle of frustration, decline to apply it where it is not shown that frustration has really taken place. They stand for the proposition that reasonable inquiry must be made and the probable long duration of the obstruction be clearly established before a case of frustration arises.

It may be argued that the rights of the parties should, for reasons of commercial convenience, be determined *eo instanti*, and that they should not be obliged to wait, in uncertainty as to their rights, for a long period. Everyone will agree that this is desirable. But it does not at all follow that either party is entitled, the moment he hears of the obstacle, to repudiate all responsibility, without evidence and without inquiry as to whether or not there is really going to be a frustration. The statement sometimes made that the rights of the parties are fixed *eo instanti* does not mean that there is always a frustration, nor does it mean that either party may on the instant take it for granted that there is a frustration without waiting long enough to make an intelligent effort to find out.

Still less does it mean that one party is at liberty to make such a voluntary fixture as was made here and thereby cut off all possibility of an early release.

It is said that in commercial contracts time is of the essence. But it does not follow that any delay, especially a delay not due to the act of either party, entitles one party to repudiate over the protest of the other. Still less is such a result possible when the contract, as here, fixes no time for performance. And the argument loses all force when it is remembered that paragraph 8 of this charter gave the charterers the option to "maintain" the charter if the vessel missed her cancelling date.

Turn the case around. Suppose that the charterers, hearing that the *Baron Ogilvy* had been requisitioned, had instantly cabled the owners that they considered the charter at an end. Suppose then that the owners had succeeded in procuring the vessel's release and had tendered her at the loading port by May 15th. The charterers would certainly have been liable if they had refused to load her. It would have been impossible for them to justify a repudiation of the charter based on nothing but the mere fact of a requisition. Certainly, if either party is bound, then both are.

The cases where delay has been held to work frustration fall into two classes: (1) Where the attendant circumstances show that the detention is bound to be inordinately long—*i. e.*, where it will of necessity last as long as a war lasts; (2) where facts are proved which show that it will last inordinately long—*e. g.*, where there is damage which cannot be repaired for a long time or where there is evidence that a requisitioned ship is certain to be kept for a long period.

Unless, in one or the other of these ways, the length of the detention is made manifest, the Court will not overthrow the contract of the parties. The present case does not fall within either of the classes referred to; and contracts should be set aside only when the circumstances very clearly require it. The doctrine of frustration is a dangerous one. It is applicable only when the Court can clearly say that, if the parties had expressly dealt with the situation presented, they would have done so by abrogating the contract. As Lord Sumner said in *Bank Line* v. *Capel & Co.*, 1919 A. C., 435, at 460:

"The danger in each case so put is that the jury will think that the contract is as wax in their hands. A. T. Lawrence, J., puts the matter very usefully thus in Souter's case, 1917, 1 K. B. at p. 249: '*No such condition (i. e., that the contract is to be considered at an end) should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document.*'"

In *Comptoir Commercial Andersois* v. *Power Son & Co.*, 1920, 1 K. B., 868, it was held that a contract for the sale and shipment of wheat was not dissolved by the fact that war had broken out and that it was impossible to secure insurance against war risks and consequently to sell exchange, which was the customary method of financing such a transaction. In holding that no defense was established, Lord Justice Scrutton said (1920, 1 K. B., at 899, 900):

"They (the courts) ought not to imply a term merely because it would be a reasonable term to

include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; *it must be such a necessary term that both parties must have intended that it should be a term of the contract and must have only not expressed it, because its necessity was so obvious that it was taken for granted.*"

If this Court is seeking to ascertain and apply the presumed intent of the parties, how can the Court find on the present record that the charter is terminated? If it had been foreseen that, five weeks prior to May 15th, the British Government, desiring vessels "for some weeks" to carry hay, would take the *Baron Ogilvy*, what reason is there to suppose that the charterers would have said that they did not want the ship at all? Tonnage was not plentiful, rates were rising (fols. 185, 209); in all human probability the charterers would have said just the opposite—that even if the ship would not be ready by her cancelling date, she must report for loading in accordance with the charter as soon as she could, and that she would then be used.

It must also be constantly borne in mind that the owners deliberately put it out of their power to perform the charter for six or seven months. The ship might have been released from the original requisition in a few weeks. They deliberately made it certain that she would not be. Surely a man cannot, by his own act and for his own advantage, change an indefinite detention of possibly very short duration into a definite detention of certainly long duration, and then use the condition thus created by himself as a reason why he should be excused from his contract. The owners

first tied up their vessel for four round trips and then immediately repudiated all obligations. They might have said: "We are prevented for the moment from performing; but, if the restraint is lifted within any reasonable time we will at once carry out our agreement." That would have been the course required by the authorities discussed above. They might at least have made inquiries as to the probable duration of the requisition before they threw up the charter. Instead, on the very same day, they fixed the ship for a prolonged period and said: "We will have nothing more to do with you." Even if an excuse exists in so far as there is a Government restraint, it surely ceases when an owner voluntarily subjects himself to a greater and longer restraint than he has to, and does it to get better rates.

The owners have not proved that the requisition caused such an interruption of the vessel's service as to terminate the charter. They have at most proved a requisition of uncertain, but probably moderate, duration, *for which they chose to substitute a voluntary engagement* for an extended period. No decision has ever upheld such a defense.

Courts should not apply the doctrine of frustration save in the clearest cases. These parties must have had in view the possibility of requisition; yet they made their contract absolute. The charterers stipulated that the ship should report for loading even after the cancelling date—they evidently wanted her whenever they could get her. What power has a Court to deprive the charterers of the right for which they expressly stipulated—that the ship should report for loading, whether she arrived early or late? The same question came up in *The Progreso*, 50 Fed., 835, where the Circuit Court

of Appeals for the Third Circuit held that it was the duty of the vessel, under a similar clause, to tender under the charter, even though it could not be done for more than a month after the cancelling date. The Court said:

"The transportation of the cotton was the object to be attained. Whether that transportation commenced on October 1st or November 1st was not as material as that the cotton should be transported. This is evidenced by the fact that delay in arriving at the port of lading did not avoid the contract by its terms, but such avoidance for such cause lay solely in the discretion of the charterers."

Nothing in this record warrants a finding that the charter could not have been performed within a reasonable time, had not the owners prevented it by engaging for four voyages. The case is not within either the rule or the reason of the rule which the decisions on frustration have laid down.

THIRD.

The alleged requisition was not in reality a legally valid requisition. The diplomatic officers of a foreign government cannot, by *ex parte* statements, preclude the Courts of the United States from ascertaining the true facts with regard to it; nor should the Courts of the United States receive or act on such statements, at least unless made through and with the sanction of the Department of State.

As has already been stated (p. 14, *supra*), the British Ambassador appeared through counsel at

the trial of this case, and offered in evidence a certificate and suggestion, which were received by the Court over the objection and exception of the charterers' counsel. A similar procedure has been followed in certain other cases, referred to below, in the lower courts.

In order that the various cases involving the effect of such action by a foreign ambassador might be heard together, counsel for the owners herein moved that this case be advanced for hearing with No. 167, which is the *The Carlo Poma, infra*, p. 69. While the two cases are of quite different characters, still the question of the status of such ambassadorial certificates is substantially the same in both.

It will be noted that the matter of the certificate is involved in some, but not in all of the questions arising in the present case. It is obviously involved in the question whether there was or was not a real and valid requisition, but it is not involved in the questions discussed in the First and Second Points above, namely, whether, assuming that there was a requisition, the contract was thereby brought to an end and the respondents relieved of liability.

1. The telegram of April 10, 1915, did not constitute a valid requisition.

As already pointed out, the only act done by way of requisition was the sending of the following telegram (p. 180, fol. 538):

"Hogarth Glasgow S S *Baron Ogilvy* is requisitioned under Royal proclamation for government service."

The Royal proclamation referred to, which appears at pages 204-205, authorizes the Lords Commissioners of the Admiralty,

"by warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty, to requisition and take up for Our service any British ship," etc.

The telegram was sent by a Mr. Foley, a subordinate official in the service of the British Admiralty.

The requisitioning telegram by its own terms was grounded upon the proclamation. No warrant or other action of the Secretary of the Lords Commissioners of the Admiralty or of any Flag Officer was ever taken. The requisition obviously and on its face was wholly outside the authority of the very document on which it purported to be based. The evidence of Sir Henry Erle Richards, who testified orally at pages 120 to 131, and whose written opinion appears at page 159, is to the effect that requisition by means of the telegram in question was not a valid action under the proclamation, and was not otherwise valid. It appeared from the evidence of Mr. Foley, who was assistant to the Director of Transports (p. 79, fol. 235), that ordinarily an official requisitioning letter was sent (p. 82, fol. 245), but that this was not done in the present case. Such a letter, if signed by one of the persons designated in the proclamation, would be, no doubt, a valid requisition. There was, however, nothing in the nature of the "warrant" required by the proclamation (p. 86, fol. 257). It was the opinion of Sir Henry Erle Richards that under these circumstances there was no valid requisition (p. 160, fols. 478-479). In answer to the contention

that the requisition might be supported as an exercise of the prerogative of the Crown apart from the proclamation, he points out (1) that the telegram "purports to derive authority from the proclamation and not from the prerogative alone"; (2) that the prerogative of the Crown cannot be exercised by any subordinate, but must be exercised by "an official of high rank or an official specially authorized. Mr. Foley himself without special authority could not exercise the prerogative and, as I have pointed out, he did not purport to do so" (p. 160, fol. 479).

The British Embassy seemingly denies the right of our Courts to examine and construe the Royal Proclamation and the acts purporting to be done thereunder. Yet in *King* v. *Delaware Insurance Co.*, 6 Cranch, 71, where an American vessel was warned by a British warship not to go to her destination on account of a blockade, this Court examined and construed the British Orders in Council and held that they did not prohibit the voyage in question and that therefore there was not a restraint of princes within the meaning of a policy of insurance on the freights. Surely that case would not have been decided differently if the British Embassy had avowed the act of the warship. So in *Corp* v. *United Insurance Co.*, 8 Johns., 277, an unauthorized threat of capture from a British cruiser was held not to constitute a restraint of princes under an insurance policy. These are clearly cases where acts done by the officials of foreign governments have been held unauthorized and therefore inoperative.

2. ***The British Embassy's certificate and suggestion should not have been received, unless through the State Department, and could not, in***

any event, preclude the Courts of the United States from ascertaining the true facts and from adjudicating the rights of private litigants in accordance with the facts thus ascertained.

It was sought by the respondents to avoid any examination into the alleged requisition and its effect by the device of a suggestion and certificate from the British Embassy. Although the parties to this litigation are private persons, and although no relief is asked for against the British Government, still the diplomatic officers of that government have intervened and sought by an *ex parte* statement, not under oath, not subject to cross-examination, and not dealing with facts of which they have any personal knowledge, to determine conclusively issues both of fact and of law, and to compel the Courts of this country to accept such determination without question. That such a statement, judged by any ordinary rule of evidence, is utterly incompetent is obvious enough, but a similar procedure has been acquiesced in in other cases by the Circuit Courts of Appeals of the Second and the Third Circuits (see *The Carlo Poma*, 259 Fed., 369; *Agency of Canadian Car Co.* v. *American Can Co.*, 258 Fed., 363; *Earn Line Steamship Co.* v. *Sutherland Steamship Co.*, 264 Fed., 276; *The Adriatic*, 258 Fed., 902), and it has thus come about that American litigants in those courts have found a deaf ear turned to their evidence and their arguments because a foreign government has chosen to inject itself into the litigation and in effect to dictate to the Court certain conclusions of fact and law.

In the present case the respondents are claiming that the [redacted] of foreign law prevented their performing their contract. It is certainly open to the Court to ascertain whether or not that is true. That inquiry necessarily involves determining whether foreign law did in fact interfere with the respondents' control of the *Baron Ogilvy*, and it is most earnestly urged that the *ex parte* statement of a foreign official to an American Court cannot possibly shut the eyes of the Court and foreclose the rights of an American litigant. It is submitted that it is nothing short of monstrous to hold that such suggestion and certificate are conclusive. It would be to confer upon foreign diplomatic representatives an unparalleled standing in court and to give them power which might, on occasion, give rise to serious abuse.

This case is a peculiarly good illustration of the danger of such proceedings, for, as pointed out below (p. 78), if the certificate and suggestion here in question mean what the owners' counsel contend that they mean, then they are untrue in fact and are shown to be so by the respondents' own evidence, including the testimony of the representative of the British Admiralty.

The owners' contention means that, in any suit involving directly or indirectly the act of a foreign government, its diplomatic representative may present to the Court an *ex parte* certificate as to the facts in controversy, and that the statements contained in such a certificate will be conclusive on the Court.

The well-recognized diplomatic practice is that all communications from foreign governments and their representatives are addressed to the Secretary

of State, who, subject to the direction of the President, has exclusive jurisdiction over such matters. The following statement of this rule may be quoted from the despatch of Secretary Seward to Mr. Dayton, Minister to France, June 27, 1862 (4 *Moore's Inter. Law Digest*, 686):

"This Department is the legal organ of communication between the President of the United States and foreign countries. All foreign powers recognize it and transmit their communications to it, through the dispatches of our ministers abroad, or their own diplomatic representatives residing near this Government. These communications are submitted to the President, and, when proper, are replied to under his direction by the Secretary of State."

And conversely:

"It is not regular for any other authority than that of the department of foreign affairs in the country where diplomatists are accredited to address letters upon public business directly to them. When such other authority has occasion to communicate with them, this is invariably done through the department intrusted with the foreign relations of the country" (Mr. Fish, Sec. of State, to Mr. Cox, Jan. 22, 1874, 101 MS. Dom. Let. 169).

In *The Luigi*, 230 Fed., 493, where a vessel was libeled for breach of charter and counsel representing the Italian Government appeared and "suggested" that the vessel be released, as a public vessel in the service of the Italian Government, the Court (District Court, Eastern District of Pennsylvania, Thompson, J.) said:

"The Court was of the opinion that inasmuch as the suggestion raised a question of international

comity, it should come through official channels of the United States Government."

The Court accordingly refused to receive the suggestion, until it was renewed by the District Attorney, "at the instance of the Attorney General."

In *The Florence H.*, 248 Fed., 1012, a suit for collision, it was, on behalf of the Republic of France, suggested that, as the vessel and crew were in the employ of the French Government, the Court should not take jurisdiction. The Court said:

"A suggestion from the Secretary of State would be one thing, since he is charged with the responsibility for our relations with other powers. But a court which is not authorized to treat in any fashion with foreign powers should be in consequence quite inaccessible to any suggestion which is based upon international considerations."

So in the case of *The Isle of Mull,* 257 Fed., 798, now on appeal to the Circuit Court of Appeal for the Fourth Circuit, where an appearance and certificate similar to those in the case at bar were offered in a similar case on behalf of the British Government, Judge Rose refused to receive them and said (Stenographer's Minutes of Trial, p. 29):

"I cannot feel that a question of disputed fact between parties one of them a citizen of this country and one a citizen of England should be tried *ex parte* before the British Ambassador and decided *ex parte* by me. There is a difference of opinion among the experts as to what was done and you are at the instance of one of the parties having an *ex parte* trial of that question disputed in England before some one in the foreign office and the foreign office issues this certificate, which precludes further examination of the subject."

The undesirability of such practice could hardly be better expressed. Judge Rose also pointed out (Stenographer's Minutes, pp. 2 and 3) that the embarrassment which a court would feel in holding such a certificate to be untrue made it, in his opinion, the only safe rule to have the State Department first investigate the question, and that then, if the suggestion comes to the Court, accompanied by a similar suggestion from the State Department, it might be received.

In *South Carolina* v. *Wesley,* 155 U. S., 542, which was a suit for possession of certain land, the Attorney General of the State of South Carolina filed a suggestion to the effect that the property in question was occupied by the State for public purposes and asked that the suit be dismissed. The Trial Court denied this application, and the case was taken by writ of error to this Court. In dismissing the writ of error, this Court said:

"The record does not show that the averments of the suggestion were either proved or admitted, and it certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion. United States v. Peters, 5 Cranch, 115; The Exchange, 7 Cranch, 116; Osborn v. Bank of the United States, 9 Wheat, 738; United States v. Lee, 106 U. S., 196; Stanley v. Schwalby, 147 U. S., 508."

If such suggestions are to be received at all, and particularly if they are to be given any conclusive effect, which last, it is submitted, should never be done, the Court should require that they come through the State Department, and that they be supported by the result of that Department's inquiry.

If, as contended by the owners, the Ambassador's certificate in the present case means that the vessel was requisitioned on April 10th, and was retained in service under the requisition until October 20th, then the certificate is in fact untrue, for, as we have already seen, the owners entered into an agreement in lieu of requisition, and it was under this, not under the requisition, that she remained in service until October 20th. This feature of the case is further referred to below (pp. 77, 78).

In the Court below, certain authorities were cited by the counsel for the owners as establishing that both this Court and the Courts of England uphold the practice of receiving such certificates and their conclusiveness. It is submitted that the cases referred to, which are briefly considered below, do not support any such propositions.

In *United States* v. *Peters*, 3 Dall., 121, a libel was filed for damages against a vessel commissioned by the French Government, for the alleged capture of a vessel of the United States. These facts appeared from an affidavit of the master of the French vessel, who moved for prohibition and, the motion having been heard on the proof thus offered, and *there being no dispute as to the facts*, the motion was granted. The case stands for nothing more than the proposition that a libel against a public vessel commissioned by a foreign government will be stayed by a prohibition upon application made by affidavit *where the facts are undisputed*.

The Exchange, 7 Cranch., 116, holds simply that a foreign public vessel is not subject to the jurisdiction of the United States courts. In that case the facts were made to appear by the intervention

of the United States District Attorney *at the instance of "the Executive Department of the Government of the United States,"* who filed a suggestion stating the facts. The commission from the French Government under which the vessel sailed was also produced and supported by affidavits of the master and of the French Consul. It therefore appeared both by the certificate of the proper officer of the United States and by affidavits what the character of the vessel was and her flag, commission and possession by French officers were all proved by competent evidence, and not merely by the suggestion of a foreign government. Here again there was *no dispute about the facts.*

In *Dupont* v. *Pichon*, 4 Dall., 321, the question was as to the immunity from arrest of the French *chargé d'affaires.* His official character was proved (1) by the production of his credentials and (2) by the taking of his deposition. Even with that proof, the Chief Justice "seemed inclined to wait for information from the Department of State, as to his actual reception by the President in that character." But, since it appeared that to wait for this would involve imprisoning him in the interim, the Court finally discharged him.

In *The Parlement Belge*, L. R. 5 P. D., 197, the facts as to the character of the vessel appeared from an intervention of the Attorney General. In that case, therefore, the Court had the certificate of the proper officer of its own government before it.

The Constitution, L. R. 4 P. D., 39, is the only one of the cases referred to where a foreign repre-

sentative appears to have communicated directly with the Court. There the Minister of the United States wrote to his solicitors a letter which was read to and considered by the Court. The Admiralty Advocate representing the British Government also intervened and protested against the exercise of jurisdiction, so that here, too, the Court had the representative of its own government before it. Here also the facts were not disputed.

In *The Crimdon*, 35 T. L. R., 81, the Court held that a Swedish steamship under time charter to the United States Shipping Board Emergency Fleet Corporation was not subject to process. There the facts appeared by an affidavit to which were attached letters, the nature of which does not appear from the report, but which apparently stated the facts as to the employment of the vessel. These facts were not disputed.

The foregoing cases indicate that the practice of communicating directly with the Court and of claiming that the Court is bound by such communication is not supported by the cases in this court and in the English courts which are referred to. It is also to be observed that in the present case there is very much more than a certificate as to a mere undisputed fact. There is presented to the Court a statement involving controverted facts and also conclusions both of fact and of law. There is also before the Court evidence showing what the true facts are, *i. e.*, that the vessel was employed under a voluntary charter.

FOURTH.

Whether or not the requisition was valid, the employment of the *Baron Ogilvy* from April to October, 1915, was not under any requisition but under a voluntary charter, and the certificate of the British Embassy should not be construed as contradicting this undisputed fact.

If it be conceded that the requisition was valid, the fact still remains that, instead of taking the benefit of the possible early release from requisition, the owners definitely postponed any such release for a period of nearly seven months by entering into a voluntary charter at better freight rates. When closely analyzed it will be seen that the suggestion and certificate of the British Ambassador were carefully drawn and do not, in fact, allege that the vessel was under requisition during this period. They set forth in nearly the same language (p. 42, fol. 126; p. 44, fol. 130) that the vessel was requisitioned on April 10, 1915, but they do not say that she remained under requisition. They go on to allege

"That the period of the said requisition was indefinite; and that from and after the date of requisition the steamship Baron Ogilvy was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915."

Therefore, even if full effect be given to the suggestion and certificate, they do not establish that the vessel was operated *under requisition* during

the intervening months, but merely that she was requisitioned on April 10th and was thereafter operated in the service of the Admiralty, a service which the other evidence shows to have been simply a charter or contract of carriage. The making by the respondents of such a contract of carriage was a breach of their charter with the petitioner.

The owners seemingly contend that the Embassy's certificate means that the requisition did in fact continue for the entire period from April to October. Since the evidence to the contrary is embodied, not only in the owners' own correspondence and testimony, but also in the evidence of the witness called from the British Admiralty itself, and since there is no contradiction whatever of this evidence, the fact as thus proved is manifestly established in the case. It is possible, as indicated above, to construe the Embassy's certificate to be consistent with the facts thus proved and therefore it should be so construed; for surely no Court will, unless obliged to do so, construe such a document to state facts which the Court knows to be untrue.

If, however, the certificate is to be construed as meaning that the vessel continued under requisition until October, then the present case vividly illustrates the dangers inherent in the admission in evidence of such documents. Such a construction would leave the British Embassy in the position of asking the Court to accept and to treat as conclusive a certificate setting forth facts which are known to be untrue, and which are established to be untrue by the evidence of the Admiralty's representative himself.

FIFTH.

The respondents, after the happening of the alleged requisition, did not make efforts to secure the release of the vessel or to substitute other tonnage.

It is admitted by the respondent Hogarth (pp. 61, 64, 65, fols. 181, 182, 190, 191, 194) that no attempt whatever was made to secure the release of the *Baron Ogilvy* from requisition or to shorten the period of requisition, or to get the Admiralty to take, in place of the *Baron Ogilvy*, one of the other unrequisitioned vessels of the same fleet. The Court below held that the respondents were under no obligation to make any such effort (p. 235, fol. 705). It is submitted that this was error. The law is plain that if a ship strands or is in collision or encounters any other similar obstacle, her owner must use all reasonable means to repair her and to make her ready to perform her charters as quickly as reasonably possible. There is no ground for applying a different rule to a case of requisition. If the owner can by reasonable efforts secure the release of the vessel or the shortening of the requisition period, he ought to do so. It is common knowledge that many such releases were secured on application, especially in the early part of the war. In the present case the owners made no effort whatever of this kind.

Nor did the owners make any efforts to substitute any other vessel. The charter is peculiar in its phraseology. It recites (fol. 449) that it is "made between J. H. Winchester & Co., Inc., • • • agents for owners of a first-class steam vessel owned by Messrs. Hugh Hogarth & Sons of Glas-

gow, and name of vessel to be declared on or before March 15th, 1915," etc. It appears from the evidence that the *Baron Ogilvy* was not owned by Hugh Hogarth & Sons, but by Hogarth Shipping Company, Ltd., although Hugh Hogarth & Sons were the agents and apparently the managers of the owner. There were other vessels not under requisition belonging to the same fleet. The Hogarth Shipping Company and the Kelvin Company, both controlled by Hugh Hogarth & Sons, owned between them about twenty vessels, of which eight appeared to have been under requisition at the time (p. 47, fols. 139-140). Where the charter is for one vessel of a certain fleet and where the vessel named encounters such an obstacle, it would seem that an obligation fairly arises to furnish another vessel within a reasonable time. Thus, in *Williams* v. *Vanderbilt*, 28 N. Y., 217, a steamship owner contracted to carry the plaintiff from New York to San Francisco, and the steamer *North America* was named as the vessel to perform the first stage of the voyage. She was lost, and the shipowner contended that that discharged him from his obligation; but the Court held that the identity of the vessel was a mere incident of the main object of the contract; that the contract could be substantially carried into effect by the use of another vessel, and that the shipowner was liable. It is submitted that the same ruling should apply to the present situation.

SIXTH.

The opinion of the Trial Judge.

The opinion of Judge Hough appears at pages 234 to 238 of the record. Since the Circuit Court of Appeals wrote no opinion, brief comment will be made on that of the Dsitrict Court.

Judge Hough correctly held that the charter contained no restraints of princes clause and no other clause of equivalent effect. He avoided any decision as to the effect of the Embassy's certificate. For reasons already given, it is submitted that he fell into error in expressing the opinion (p. 235, fol. 705) that the respondents were not bound to use efforts to prevent the requisition.

The opinion goes on (pp. 235-236, fols. 705-706):

"It was entirely within their right to seek (when governmental rise [use?] was certain) the carriage of mules instead of something else, if mules promised less loss than other probable freight. This they did—nothing more."

The learned Judge at this point seemingly failed to note one of the most important points in the case. If the owners had done only what the Judge says they did—namely, substituted mules in place of hay as the cargo to be carried—the matter would, of course, be wholly immaterial. But they did a great deal more than this. They changed an indefinite, but probably not very long, period of government service into a very prolonged one by their own voluntary act and for the purpose of securing higher freights. By their interference they deprived the charterers of the benefit which would

have been derived from the vessel's early release. Instead of voyages for a few weeks with hay from Belfast, presumably to France, which was the service originally contemplated, they induced the Government to enter into a contract to charter their vessel for many months for a succession of trans-Atlantic voyages. This point is of the very first importance.

The opinion then proceeds to consider the question of impossibility, and finally rests decision on the ground that the so-called requisition amounted to destruction of the subject-matter of the contract. The fallacy of this view has already been commented on (pp. 37-38, *supra*). There would be more to say in favor of that view if there were any evidence in the case that the requisition was likely to be a prolonged one, or if the long duration of the vessel's government service had been due to the strong arm of the Government instead of to the voluntary action of the owners.

CONCLUSION.

The petitioner urges that there was here no valid requisition. If, however, it be found that there was a valid requisition, it is further urged that no act of the British Government can dissolve the contract, especially when the contract was made in contemplation of the very contingency which happened and when the parties failed to provide in the contract for that contingency. Moreover, it was not the requisition but the owners' act in prolonging the vessel's service by a voluntary agreement which led to the long delay. It is for

the owners, if they wish to claim frustration by delay, to establish that the requisition, if it had not been prolonged by the owners' contract with the Government, would have lasted so long as to cause "inordinate" delay. There is no such evidence in the case.

As regards the certificate and suggestion, such documents should preferably not be received at all. If received, however, they should come through the Department of State and should at most constitute *prima facie* evidence.

The decree should be reversed and the cause be remanded, with instructions to enter a decree for the petitioner (the libelant below) for the damages sustained by it.

New York, January 7, 1921.

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